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United States of America

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 435

INLAND STEEL COMPANY,
A CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
AND
UNITED STEEL WORKERS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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STATEMENT.

This brief is in reply to the brief for the National Labor Relations Board in opposition, which was filed on January 7, 1949.

The statement of facts in the Board's brief inadvertently omits one matter of basic importance. Petitioner's original retirement and pension plan of 1936, its extended plan of 1943, and its past service pension trust of 1945 all included compulsory retirement at age 65 (R. 410).

ARGUMENT.

I.

AS A MATTER OF LAW A COMPANY-WIDE RETIREMENT AND PENSION PLAN CANNOT BE BARGAINED ABOUT IN VARIOUS BARGAINING UNITS IN A COMPANY'S PLANTS.

This is the heart of the case. The Board ignores it until the very close of its brief, where it devotes about a page to the question, and even then misunderstands and misstates it. The Board says (Bd. Br. 21):

“The Company contends (Pet. 8-11, 19) that its present pension and retirement plan cannot, as a practical matter, be bargained about by the Company and the various representatives of the employees in the numerous bargaining units in the Company's plants.”

The Company does not so contend. It contends that *as a matter of law* it is impossible for it to bargain collectively with the Union concerning its pension policies. Those policies have at all times been expressed, and are now expressed, in the form of a company-wide retirement and pension plan. Since the duty to bargain is confined to matters concerning which the employer is free to contract with the Union, and since the Act itself prohibits the Company from contracting with the Union concerning matters applicable to other units, *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 44, 45, the Company as a matter of law cannot bargain collectively in the statutory sense concerning its company-wide retirement and pension plan.

It will be argued that this does not prevent bargaining on unit-wide pension and retirement policies. The answer is that, where there are two or more units, such bar-

gaining would tend to destroy a company-wide plan, which is the form that most important plans take (R. 343, 348, 349). It is well known that Congress is interested in furthering the type of security provided by pension and retirement plans. This Court should review a decision which will have an effect so clearly opposed to the Congressional purpose.

It is not a question of the complexity of retirement and pension plans, as the Board and the court below seem to believe (Bd. Br. 21). Were the Company's plan simplicity itself *but company wide*, it would be legally impossible for it to bargain collectively about the plan, for the reason that the duty to bargain is clearly confined (Section 8 (d)) to matters the employer may contract about with the Union and he is prohibited from contracting with the Union about anything outside the unit, as already pointed out.

The Board suggests that the Unions representing the employees in the various bargaining units in the Company's plants might all agree to the same company-wide plan. This amounts to a concession that the bargaining the Board is contending for could be carried out only by obliterating the bargaining units set up under the statute. There could be no more effective demonstration that retirement and pension plans cannot be bargained about in the statutory sense.

II.

AS A MATTER OF LAW A UNION-WIDE PENSION PLAN CANNOT BE BARGAINED ABOUT IN THE VARIOUS BARGAINING UNITS WHICH IT COVERS.

The Board does not see fit to mention this problem, which is fully presented on pages 10 and 11 of our petition. The duty to bargain under the Act applies equally to unions and employers and the definition of the duty is

the same for both. Section 8 (d). There are a number of *union-wide* retirement and pension plans, each of which covers employees of many companies, who are organized in many different bargaining units, and typically no bargaining unit in such cases is larger than company-wide. For the reasons stated under the preceding point, as a matter of law a union-wide pension plan cannot be bargained about in the statutory sense in the various bargaining units which it covers.

The fact is that it is indispensable to the encouragement and growth of retirement and pension plans that this Court shall hold that they are *not* within the ambit of compulsory collective bargaining under the Act. To hold otherwise would restrict and eventually destroy them.

III.

THE J. I. CASE CONCERNED THE PRECISE QUESTION HERE PRESENTED, NAMELY, WHAT SUBJECTS ARE EXCLUDED FROM THE EMPLOYER'S OBLIGATION TO BARGAIN, AND THE HOLDING OF THIS COURT IS CONTRARY TO THAT OF THE COURT BELOW.

The Board does not reach the point of taking issue with the reasons assigned by petitioner for granting the writ until page 19 of a 22-page brief. It then asserts that our contention that the decision of the court below is in conflict with the decision of this Court in *J. I. Case Co. v. Labor Board*, 321 U. S. 332, is without merit.

Thus the Board asserts that the *J. I. Case* case "concerned the question whether contracts between an employer and individual employees might work a limitation upon the employer's obligation to bargain collectively with the employees' statutory representative on behalf of all of the employees in the unit" (Bd. Br. 19). We agree. But the Board then goes on to say that "The Court did not have

before it, and did not pass upon, the question here presented, whether pension and retirement matters are subjects of compulsory collective bargaining" (id.). With this we flatly disagree.

The Court had before it the question whether matters like retirement and pension plans are subjects of compulsory collective bargaining and held in terms that they are not. The point is fully covered at pages 12 to 14 of our petition, to which we respectfully refer the Court.

IV.

THE DECISION OF THIS COURT IN THE HEINZ CASE IS ALSO CONTRARY TO THAT OF THE COURT BELOW.

The Board attempts to escape from the effect of the decision of this Court in *H. J. Heinz Co. v. Labor Board*, 311 U. S. 514, by saying that "There is nothing in the opinion in that case to suggest that the scope of the bargaining requirement under the National Labor Relations Act is limited to precisely the scope of the bargaining requirement under the Railway Labor Act" (Bd. Br. 20). The Board cannot make such a statement except by closing its eyes to the language which this Court used in the *Heinz case* to the effect that Congress incorporated in the Wagner Act "the collective bargaining requirement" of the Railway Labor Act and of Section 7 (a) of the National Industrial Recovery Act. Again the point is fully covered in our petition, page 16, to which we refer.

V.

THE CONTEMPORARY SETTING IN WHICH THE LANGUAGE WAS USED DEMONSTRATES THAT THE ORIGINAL ACT EXCLUDED RETIREMENT AND PENSION PLANS FROM COMPULSORY COLLECTIVE BARGAINING, AND THAT CONSTRUCTION IS CONTROLLING TODAY.

The following statement of the Board (Bd. Br. 20):

“The court below also properly rejected the Company’s contention that when the original Act was passed in 1935, pension and retirement matters were not subjects of collective bargaining and that, therefore, they can not be deemed to fall within the bargaining requirement of the Act (R. 418)”

is both erroneous and misleading. We did so contend, and vigorously. But the court below did not reject the contention; it misunderstood it and rejected an entirely different contention which it imputed to us. Thus, the court said (R. 418):

“It may be true, as argued by the Company, that retirement and pension plans were employed only to a limited extent in 1935, when the original Act was passed.”

It was not true, and it was not argued by the Company, that retirement and pension plans were employed only to a limited extent in 1935 when the original Act was passed. As we have already shown at page 17 of our petition herein, such plans were extensively employed in this country at that time and covered several millions of employees. It is clear from the passage last quoted that the court below entirely missed the point as to the contemporary setting in which the Act was passed.

It is true that the court below agreed with the Board’s view that retirement and pension plans were bargained about collectively in 1947 when the Act was amended (Bd. Br. 20), but it is equally true that the extent of such bar-

gaining was relatively insignificant (R. 366, App. to Resp. Br. below 58, 59), and the fact that such bargaining occurred at all is totally irrelevant. The statutory language defining compulsory collective bargaining was not changed in the amendment, and therefore continued to mean in 1947 what it originally meant in 1935. *Heald v. District of Columbia*, 254 U. S. 20, 22, 23.

The Board closes its discussion of the scope of compulsory bargaining by referring to what it calls the observation of the court below (Bd. Br. 21) "that Congress did not intend to tie the scope of the bargaining requirement of the Act to 1935 concepts." As a matter of fact, the observation was only a qualified one. What the court actually said was that it "did not believe that it was contemplated that the language of Sec. 9 (a) was to remain static."

The question, however, is not what was "contemplated." Congress has no power to enact a statute and "contemplate" that its language will mean one thing at the time and the opposite at some later date. Whatever it means when it is enacted, it continues to mean. The point is dealt with fully in our petition at pages 17 to 19.

The cases cited by the Board for the purpose of establishing the contrary do not do so. Indeed they support the view that the meaning of statutes does not change. *Board v. Hearst Publications*, 322 U. S. 111, cited by the Board on this question, involved the issue whether newsboys are employees of the newspaper companies whose papers they distribute within the meaning of the term as used in the National Labor Relations Act. The court said (p. 124):

"Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning * * *'. Rather 'it takes color from

its surroundings * * * [in] the statute where it appears,' *United States v. American Trucking Assns.*, 310 U. S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' "

This is not contrary to our position that the meaning of a statute does not change; it supports it. It holds that the meaning of the term "employees" as used in this Act must be determined from the history, terms and purposes of the legislation. The implication is that, whatever it is determined to mean by those tests, it continues to mean, inasmuch as the history, terms and purposes of the legislation continue to be the same as long as it is on the books.

Weems v. United States, 217 U. S. 349, is no more helpful to the Board. All that that case held was that general language in a statute is not confined to the form that the evil had theretofore taken but applies equally to new conditions which arise with the passage of time. We do not deny that proposition; indeed we assert it. The statute continues to mean the same thing and applies to new conditions. Here the conditions (retirement and pension plans) are not new but old. They existed when the language was adopted by the legislature. It excluded them from the ambit of compulsory bargaining. As a result of the passage of time its meaning cannot change so as to include them.

Vermilya-Brown Co. v. Connell, 69 S. Ct. 140, is no more helpful to the Board. Indeed, this case also squarely supports our position. The question was whether the Bermuda base leased by the United States during World War II was a "possession" within the meaning of the Fair Labor Standards Act. Of course, when that Act was passed the Bermuda base did not exist and had never been thought of. The Court said (p. 146):

"* * * Under such circumstances, our duty as a Court is to construe the word 'possession' as our judg-

ment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind."

This makes it clear that the meaning of the legislation continues to be precisely what it was when it was passed. That is the rule we urge here. It is a rule long established and universally applied by this Court, and the decision below stands in direct conflict with it.

VI.

THE BOARD'S ARGUMENT THAT THERE IS NO NEED FOR FURTHER REVIEW DEMONSTRATES THE CONTRARY.

The Board concedes that the petition involves a question of importance (Bd. Br. 10) and in the light of the considerations set forth at pages 6 to 11 of our petition this could not be denied. The Board apparently also concedes that the question has not been settled by this Court, as it does not assert the contrary. This is sufficient under paragraph 5 (b) of Rule 38 to justify granting the writ.

The Board attempts, however, to neutralize the effect of these concessions by going directly to the merits and attempting to show that the decision below was correct. But that question does not arise unless review is granted and the very purpose of review is to determine it. To say that, despite the importance of the question and the fact that this Court has not settled it, review should be denied because the decision below is correct constitutes nothing less than an attempt by the Board to usurp the functions of this Court. The Board says, in effect, to this Court, "You need not bother to review this decision. We have done so and find that it is correct." The Board, in effect, has set itself up as the authority to review the Court of Appeals and so save this Court the trouble. We respect-

fully assert that the Board's opinion on the merits is not a valid ground for refusing a review.

We pass now to the Board's attempt to show that the decision below is so clearly correct that there is no need for further review. An elaborate, but only partial, discussion of the merits extends from page 11 to page 19 of the Board's brief and occupies 7 pages of an argument of less than 13. It is difficult to believe that a clear case would require so extensive an argument to support it. The length of the presentation, its complexity and the number of authorities cited and discussed make it clear that the case, on the merits, has two sides. There was a dissent before the Board (R. 76-78) and there are expressions of doubt in the decision below (R. 412, 417, 418, 419). Moreover our petition has disclosed that on four controlling questions the decision of the court below is in error, and, as noted above at pages 2 to 9 of this reply, the Board has failed to refute the existence of such error. For all these reasons we submit that this is not a case in which the Court can anticipate the question which a review would present and say, "There is nothing worthy of review."

If it were proper to do so, we would prepare for the Court's convenience and incorporate in this brief a very succinct reply to the Board's argument on the merits. But rather we heed the warning voiced by Mr. Justice (then Professor) Frankfurter and Professor Hart in *The Business of the Supreme Court* at October Term, 1933, 48 *Harvard Law Review* 238, where the following statement appears (p. 265):

"* * * The major recurrent vice of petitions, apparent from the most casual examination of a representative sampling, is the failure to perceive the elementary distinction between an extended argument on the merits (obviously inappropriate until the merits are before the Court) and an argument on the issue whether *certiorari* should or should not be granted.

Only in exceptional cases is any but cursory discussion of the merits appropriate in the petition at all."

The fact is that this is preeminently a case where review should be granted. It involves the construction of important language of the National Labor Relations Act, perhaps the most important in that statute. In 18 cases since the Act was passed in 1935 this Court has granted review assigning as the sole reason for such action the fact that the construction of important language of the National Labor Relations Act was involved. We cite them in the margin.*

The question presented by the petition in the instant case is of exactly the same type as in the foregoing cases and of at least equal importance.

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* *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 460; *Labor Bd. v. Greyhound Lines*, 303 U. S. 261, 264; *Labor Board v. Fainblatt*, 306 U. S. 601, 604; *Labor Board v. Columbian Co.*, 306 U. S. 292, 296; *Labor Board v. Link-Belt Co.*, 311 U. S. 584, 585; *H. J. Heinz Co. v. Labor Board*, 311 U. S. 514, 516; *Labor Board v. Express Pub. Co.*, 312 U. S. 426, 430; *Pittsburgh Glass Co. v. Board*, 313 U. S. 146, 149; *Labor Board v. Virginia Power Co.*, 314 U. S. 469, 476; *Labor Board v. Electric Cleaner Co.*, 315 U. S. 685, 690; *Labor Board v. I. & M. Electric Co.*, 318 U. S. 9, 11; *Medo Corp. v. Labor Board*, 321 U. S. 678, 680; *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 334; *Board v. Hearst Publications*, 322 U. S. 111, 113; *Wallace Corp. v. Labor Board*, 323 U. S. 248, 251; *May Stores Co. v. Labor Board*, 326 U. S. 376, 378; *Labor Board v. Cheney Lumber Co.*, 327 U. S. 385, 387; and *Labor Board v. Donnelly Co.*, 330 U. S. 219, 222.